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18 UNITED STATES BANKRUPTCY COURT  
19 NORTHERN DISTRICT OF CALIFORNIA  
20 SAN FRANCISCO DIVISION

21 In re ) CASE NO. 11-31376-DM  
22 Howrey LLP, )  
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1 Citibank, N.A. (“Citibank”), a secured creditor in the case of the above-captioned  
2 debtor (the “Debtor”), by and through its undersigned counsel, hereby submits this memorandum  
3 of points and authorities in support of its motion, pursuant to sections 105(a), 1104(a) and  
4 1112(b) of Title 11 of the United States Code (the “Bankruptcy Code”) and Rule 1017(f) of the  
5 Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), for entry of an order (the  
6 “Order”), substantially in the form attached hereto as Exhibit A, converting the above-captioned  
7 case (the “Chapter 11 Case”) to one under chapter 7 of the Bankruptcy Code, or alternatively,  
8 appointing a chapter 11 trustee.<sup>1</sup> In support of the motion (the “Motion”), Citibank relies upon  
9 the declaration of G. Michael Verdisco (the “Verdisco Declaration”) filed concurrently herewith,  
10 and respectfully represents as follows:

## **PRELIMINARY STATEMENT**

12 Over the past several months since the commencement of the Chapter 11 Case,  
13 the Debtor, Citibank and the Official Committee of Unsecured Creditors (the “Creditors’  
14 Committee”) have engaged in extensive, good faith negotiations regarding the terms of a  
15 consensual plan to wind-down the Debtor’s estate in chapter 11. Throughout these negotiations,  
16 Citibank has endeavored to work cooperatively with the Debtor to maximize the value of its  
17 estate, and, to that end, approximately \$5.8 million of Citibank’s cash collateral has to date been  
18 used by the Debtor to fund administration of the Chapter 11 Case. Unfortunately, despite the  
19 parties’ good faith efforts, they have been unable to agree on the terms of a long-term budget that  
20 would govern the Debtor’s use of Citibank’s cash collateral for such wind-down efforts. With  
21 the parties at an impasse, Citibank is compelled to seek conversion of the Chapter 11 Case to a  
22 case under chapter 7 of the Bankruptcy Code, or alternatively, the appointment of a chapter 11  
23 trustee, in order to minimize ongoing administrative costs (funded from Citibank’s cash  
24 collateral) and to facilitate the maximization of recoveries for the benefit of the Debtor’s estate.

26       1 The proposed Order attached hereto as Exhibit A only addresses conversion of the Chapter 11 Case to a case  
27 under chapter 7 of the Bankruptcy Code. If, alternatively, the Court determines to appoint a chapter 11 trustee,  
Citibank will submit a revised form of order reflecting such relief.

1           As the Court is well aware, this is a liquidating case; Howrey LLP went into  
2 dissolution on March 15, 2011, almost all of its attorneys have joined new law firms, and the  
3 Debtor has not generated any material new revenue since the Petition Date. Nevertheless, the  
4 Debtor has incurred substantial administrative expenses since the Petition Date. The Debtor has  
5 also consistently failed to meet its projected collections of account receivables since the Petition  
6 Date, and has experienced a precipitous decline in such collections over the past several weeks.  
7 Finally, the vast bulk of the Debtor's remaining assets, which are principally uncollected  
8 accounts receivable from cases that the Debtor billed on an hourly basis (the "Hourly Cases") or  
9 on a contingent fee basis (the "Contingent Cases"), can be effectively liquidated by a trustee.

10           In light of the substantial diminution in the value of the Debtor's estate that has  
11 occurred to date without any reasonable commensurate benefit, Citibank does not consent to the  
12 use of its cash collateral beyond September 23, 2011, when the Supplemental Cash Collateral  
13 Order (as defined below) expires by its own terms. Accordingly, Citibank submits that cause  
14 exists to convert the Chapter 11 Case to a case under chapter 7 of the Bankruptcy Code, or  
15 alternatively, that it would be in the best interests of the Debtor's creditors and estate to appoint a  
16 chapter 11 trustee.<sup>2</sup>

17           JURISDICTION

18           This Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157  
19 and 1334(b). This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). The statutory  
20 bases for the relief requested herein are sections 105(a) and 1112(b) of the Bankruptcy Code and  
21 Bankruptcy Rule 1017(f).

22  
23  
24           <sup>2</sup> Section 1104(a) of the Bankruptcy Code provides, in relevant part, that the Court "shall order the appointment  
25 of a trustee . . . (3) if grounds exist to convert . . . the case under section 1112, but the court determines that  
26 the appointment of a [chapter 11] trustee . . . is in the best interests of creditors and the estate." 11 U.S.C. §  
27 1104(a)(3). As set forth herein, "cause" exists under section 1112 to convert the Chapter 11 Case to a case  
28 under chapter 7 of the Bankruptcy Code. If, however, the Court finds that the appointment of a chapter 11  
trustee would instead be in the best interests of creditors and the estate, Citibank hereby alternatively requests  
such relief.

**RELIEF REQUESTED**

Citibank requests entry of an Order, substantially in the form attached hereto as Exhibit A, converting the Chapter 11 Case to a case under chapter 7 of the Bankruptcy Code, or alternatively, appointing a chapter 11 trustee.

## **BACKGROUND**

The Debtor is a limited liability partnership organized under the laws of the District of Columbia. On April 11, 2011 (the “Filing Date”), certain putative creditors of the Debtor filed an involuntary petition against the Debtor under chapter 7 of the Bankruptcy Code (the “Involuntary Case”) in the Bankruptcy Court for the Northern District of California (the “Court”). On June 6, 2011, an order was entered converting the Involuntary Case to a voluntary case under chapter 11 of the Bankruptcy Code (the “Petition Date”).

The Debtor is a party to: (a) the Fourth Amended and Restated Secured Loan Agreement dated as of October 19, 2010 by and between Howrey and Citibank, as Lender, as amended by a First Amendment thereto dated as of December 3, 2010, and as further amended by a Second Amendment thereto dated as of December 20, 2010 (as so amended, the “Pre-Petition Financing Agreement”); (b) the Fourth Amended and Restated Security Agreement dated as of October 19, 2010 made by and among Howrey, The CapAnalysis Group, LLC (“CAG”), and Maxiam, LLC (“Maxiam”), as Grantors, in favor of Citibank (the “Pre-Petition Security Agreement”); (c) the Continuing Guaranty of Firm Affiliate (General Indebtedness) dated as of October 19, 2010 made by CAG in favor of Citibank (the “CAG Continuing Guaranty”); (d) the Continuing Guaranty of Firm Affiliate (General Indebtedness) dated as of October 19, 2010 made by Maxiam in favor of Citibank (the “Maxiam Continuing Guaranty”, and together with the CAG Continuing Guaranty, collectively, the “Guaranties”); (e) the New \$20,000,000 Note dated as of December 20, 2010 for \$20,000,000 executed by Howrey in favor of Citibank; (f) the 364-Day Note dated as of December 20, 2010 for \$60,000,000 executed by Howrey in favor of Citibank; (g) each other “Note” (as defined in the Pre-Petition Financing Agreement) from time to time issued by Howrey in favor of Citibank; and (h) each other “Loan

1       Document" as defined in the Pre-Petition Financing Agreement (collectively, the "Pre-Petition  
2       Financing Documents").

3              Under the Pre-Petition Financing Documents, certain loans, advances and other  
4       extensions of credit were made by Citibank to Howrey (including the issuance of Letters of  
5       Credit for the account of Howrey). As of the Petition Date, the principal amount of loans  
6       outstanding under the Pre-Petition Financing Documents was approximately \$49.1 million,  
7       together with all interest, fees, undrawn Letters of Credit, reimbursement obligations in respect  
8       of drawn Letters of Credit, swap obligations and other amounts owing under the Pre-Petition  
9       Financing Documents (the "Pre-Petition Debt").

10          Pursuant to the terms of the Pre-Petition Financing Documents, the Pre-Petition  
11       Debt is secured by, among other things, liens and security interests (the "Pre-Petition Liens")  
12       granted by the Debtor and the other obligors on substantially all of their personal property assets,  
13       including, without limitation, billed and unbilled accounts receivable, including the Hourly Cases  
14       and Contingent Cases, and disbursements and all proceeds, products and/or property received on  
15       account of or in satisfaction thereof, all furniture, furnishings, fixtures, equipment and other  
16       tangible personal property, the Citibank Accounts maintained with Citibank and all funds held  
17       therein and all certificates and instruments, if any, representing or evidencing same (collectively,  
18       the "Pre-Petition Collateral").

19          On June 15, 2011, the Court entered an interim order authorizing the Debtor's use  
20       of Citibank's cash collateral, pursuant to the agreement between Citibank and the Debtor on the  
21       terms and conditions set forth therein (the "Interim Cash Collateral Order"). The Interim Cash  
22       Collateral Order included, among other things, an agreed-upon budget that set forth the amount  
23       and type of the Debtor's permitted expenditures, as well as the Debtor's estimate of revenues  
24       expected to be collected during the period from the Petition Date through August 26, 2011 (as  
25       amended, the "Budget"). During this initial twelve-week period following commencement of  
26       the Chapter 11 Case, Citibank, the Debtor and the Creditors' Committee engaged in extensive  
27       and constructive negotiations regarding a long-term budget that could be approved as part of a

1 final cash collateral order. However, the parties were not able to agree on the terms of an  
2 extended budget prior to August 26th, the date when the Interim Cash Collateral Order expired  
3 by its own terms. To permit the negotiations regarding a longer-term budget and chapter 11  
4 wind-down strategy to continue, the parties quickly agreed to a three-week extension of the  
5 Budget and the Debtor's use of cash collateral. On September 1, 2011, the Court entered an  
6 order approving this extended interim Budget (the "Supplemental Interim Cash Collateral  
7 Order"). The Debtor's use of cash collateral pursuant to the Supplemental Interim Cash  
8 Collateral Order expires by its terms on September 23, 2011.

**BASIS FOR RELIEF REQUESTED**

10 I. Cause Exists to Convert the Chapter 11 Case to a Case Under Chapter 7 of the  
Bankruptcy Code

Section 1112(b)(1) of the Bankruptcy Code provides that the Court shall, upon request of a party in interest and after notice and a hearing, and if there are no unusual circumstances establishing that conversion is not in the best interests of creditors and the estate, convert a case under chapter 11 of the Bankruptcy Code to a case under chapter 7 of the Bankruptcy Court for cause. *See* 11 U.S.C. § 1112(b)(1); *see generally In re Prisco Props., LLC*, No. 10-21719, 2010 WL 4412095, at \*3 (Bankr. D.N.J. Nov. 1, 2010) (citation omitted) (noting that the 2005 amendments to the Bankruptcy Court were “intended to make it more difficult to defeat a request for conversion or dismissal”).<sup>3</sup>

Once “cause” is shown, the burden of proof shifts to the party objecting to the requested relief “to either: (a) demonstrate that unusual circumstances exist that would make dismissal or conversion unfavorable to the creditors or estate; or (b) establish that a plan will be confirmed and that the act or omission that forms the basis for the aforementioned cause to dismiss or convert will be cured within a reasonable time.” *StellasOne Bank v. Lakewatch LLC*

<sup>3</sup> For the Court's convenience, a copy of the unreported decision in *In re Prisco Properties, LLC* is attached hereto as Exhibit B.

1           (*In re Park*), 436 B.R. 811, 815 (Bankr. W.D. Va. 2010) (citation omitted); *see also* 11 U.S.C.  
2 § 1112(b)(2).

3           The list of what constitutes “cause” includes, but is not limited to, the sixteen  
4 factors set forth in section 1112(b)(4) of the Bankruptcy Code. *See* 11 U.S.C. § 1112(b)(4)(A) to  
5 (P). In considering a motion filed pursuant to section 1112(b), the Court need not limit its  
6 review to the grounds set forth in the statute and may, using its equitable powers, look to other  
7 factors that justify granting conversion or dismissal of a case. *See, e.g.*, *Carolin Corp. v. Miller*,  
8 886 F.2d 693, 699 (4th Cir. 1989) (“The court will be able to consider other factors as they arise,  
9 and to use its equitable powers to reach an appropriate result in individual cases.”) (citation and  
10 internal quotation omitted); *In re C-TC 9th Ave. P’ship*, 113 F.3d 1304, 1311 (2d Cir. 1997); *In*  
11 *re BH S & B Holdings, LLC*, 439 B.R. 342, 346 (Bankr. S.D.N.Y. 2010). In addition, the Court  
12 has “wide discretion” in determining whether cause exists under section 1112(b). *In re BH S*  
13 & *B*, 439 B.R. at 346 (citations omitted).

14           The first statutory example of what can constitute cause is “substantial or  
15 continuing loss to or diminution of the estate and the absence of a reasonable likelihood of  
16 rehabilitation.” 11 U.S.C. § 1112(b)(4)(A). Citibank submits that cause overwhelmingly exists  
17 under this subsection, and that conversion of the Chapter 11 Case to a case under chapter 7 of the  
18 Bankruptcy Code is therefore warranted.

19           In determining whether the first prong of this element is present, the Court “must  
20 make a full evaluation of the present condition of the estate, [and] not merely look at the debtor’s  
21 financial statements.” *In re AdBrite Corp.*, 290 B.R. 209, 215 (Bankr. S.D.N.Y. 2003) (citation  
22 omitted). A continuing loss or diminution of the estate “may be tolerated where reorganization is  
23 feasible and the pattern of unprofitable operations can be reversed as a result of a successful  
24 reorganization. The debtor, however, should not continue in control of the business beyond a  
25 point at which reorganization no longer remains realistic.” *Id.*

26           In the instant case, it is beyond dispute that the first prong of this test is satisfied.  
27 The Debtor has incurred approximately \$5.8 million in administrative costs since the  
28

1 commencement of the case. However, this is a liquidating case and the Debtor is essentially no  
2 longer operating or generating any new accounts receivable to fund these substantial costs.  
3 Accordingly, all of the Debtor's administrative costs are being funded from Citibank's cash  
4 collateral – cash and ongoing collections of accounts receivable – which means there has  
5 necessarily been a substantial and continuing diminution in the value of the Debtor's estate.

6 In addition, the Debtor has consistently failed to meet its projected estimates of  
7 future collections of accounts receivable in Hourly Cases, and the rate of such collections has  
8 precipitously declined since commencement of the Chapter 11 Case. This is most likely because  
9 the Debtor was able to successfully monetize its higher-quality accounts receivable early in the  
10 case, which has now left it with receivables that will likely be more difficult to monetize.  
11 Indeed, \$32.7 million of the Debtor's \$33.3 million in total outstanding U.S. accounts receivable,  
12 or approximately 98.2%, are more than 91 days old.

13 Finally, and as discussed in greater detail below, the timing and amount of the  
14 Debtor's recovery on the Contingent Cases remains speculative at this juncture. Moreover, since  
15 the Petition Date, the prospect of any substantial and immediate recovery from the Contingent  
16 Cases has diminished due to certain recent adverse rulings and procedural delays that could  
17 potentially impair the Debtor's ultimate recoveries in such cases.

18 The second prong of section 1112(b)(4)(A) – absence of a reasonable likelihood  
19 of rehabilitation – is unquestionably satisfied here. *See, e.g., Loop Corp. v. U.S. Trustee*, 379  
20 F.3d 511, 515-16 (8th Cir. 2004) *cert. denied*, 543 U.S. 1055 (2005); *In re BH S & B*, 439 B.R. at  
21 347-48 (citing cases and noting those following *Loop*). Howrey went into dissolution on  
22 March 15, 2011, and the Debtor converted the Involuntary Case to this Chapter 11 Case for the  
23 sole purpose of liquidating its remaining assets, most notably the Hourly Cases and the  
24 Contingent Cases, and thereafter distributing those assets in an orderly and efficient manner  
25 under chapter 11 of the Bankruptcy Code. The Debtor has essentially ceased operating and all  
26 but a few of its attorneys have joined new law firms. Accordingly, there is no question that the

1 Debtor will not be able to rehabilitate its business, and therefore the second prong of section  
2 1112(b)(4)(A) is satisfied.

3                 Once the Court determines that cause exists, it must determine whether  
4 conversion or dismissal is in the best interest of creditors and the Debtor's estate. *See In re Ho*,  
5 274 B.R. 867, 877 (9th Cir. B.A.P. 2002) ("A court is obligated to choose between [conversion  
6 and dismissal] based on the best interests of the creditors and the estate."). Courts have  
7 considered the following factors in connection with such a determination:

- 8                 1. Whether some creditors received preferential payments, and whether  
9                     equality of distribution would be better served by conversion rather than  
dismissal.
- 10                 2. Whether there would be a loss of rights granted in the case if it were  
dismissed rather than converted.
- 11                 3. Whether the debtor would simply file a further case upon dismissal.
- 12                 4. The ability of the trustee in a chapter 7 case to reach assets for the benefit  
of creditors.
- 13                 5. In assessing the interest of the estate, whether conversion or dismissal of  
the estate would maximize the estate's value as an economic enterprise.
- 14                 6. Whether any remaining issues would be better resolved outside the  
bankruptcy forum.
- 15                 7. Whether the estate consists of a "single asset."
- 16                 8. Whether the debtor has engaged in misconduct and whether creditors are  
in need of a chapter 7 case to protect their interests.
- 17                 9. Whether a plan has been confirmed and whether any property remains in  
the estate to be administered.
- 18                 10. Whether the appointment of a trustee is desirable to supervise the estate  
and address possible environmental and safety concerns.

23 7 COLLIER ON BANKRUPTCY § 1112.04[7]; *see also In re Staff Inv. Co.*, 146 B.R. 256, 260  
24 (Bankr. E.D. Cal. 1992) ("The standard for choosing conversion or dismissal based on the best  
25 interest of creditors and the estate implies a balancing test to be applied through case-by-case  
26 analysis. In the end, the determination is a matter for sound judicial discretion.") (citation and  
27 quotation omitted).

1           For many reasons, conversion, and not dismissal, is unquestionably in the best  
2 interests of the Debtor's estate. For example, certain of the Debtor's largest unsecured creditors  
3 are its previous landlords for its now closed offices. If the Chapter 11 Case were dismissed, the  
4 Debtor would lose the benefit of the statutory cap in section 502(b)(6) of the Bankruptcy Code to  
5 limit such landlords' lease rejection claims, which would have a substantial and deleterious  
6 impact on recoveries for all other unsecured creditors. In addition, the Debtor's estate may have  
7 potential claims and causes of action against a variety of parties. A trustee would be in the best  
8 position to review and investigate such claims and, if appropriate, prosecute them for the benefit  
9 of all creditors. Accordingly, conversion, and not dismissal, is in the best interest of the  
10 Debtor's creditors and its estate.

11           Based on the foregoing, and given the certainty of continuing and substantial  
12 diminution in the value of the Debtor's estate, cause exists under section 1112(b)(1) of the  
13 Bankruptcy Code to convert the Chapter 11 Case to a case under chapter 7 of the Bankruptcy  
14 Code. Citibank also requests that any chapter 7 trustee appointed in this case be authorized to  
15 continue to operate the Debtor pursuant to section 721 of the Bankruptcy Code, at least for a  
16 short transition period, to ensure an orderly wind-down of the Debtor's affairs.

17 II. The Chapter 11 Case Should be Converted to a Case Under Chapter 7 of the Bankruptcy  
18 Code Because Citibank Does Not Consent to the Debtor's Continued Use of its Cash  
Collateral in Chapter 11 and the Debtor Cannot Provide Adequate Protection

19           Section 363(c)(4) of the Bankruptcy Code provides that the trustee shall segregate  
20 and account for any cash collateral in the trustee's possession, custody, or control." 11 U.S.C.  
21 § 363(c)(4). Additionally, section 363(e) of the Bankruptcy Code provides that "on request of an  
22 entity that has an interest in property . . . to be used . . . by the trustee, the court . . . shall prohibit  
23 or condition such use . . . as is necessary to provide adequate protection of such interest."  
24 11 U.S.C. § 363(e). The purpose of adequate protection is to preserve the creditor's position and  
25 to protect the secured creditor from diminution of the value of its interest in collateral during the  
26 bankruptcy process. *In re Worldcom, Inc.*, 304 B.R. 611, 618-19 (Bankr. S.D.N.Y. 2004); *In re*  
27 *Swedeland Dev. Grp., Inc.*, 16 F.3d 552, 564 (3d Cir. 1994).

1                   Courts determine adequate protection for purposes of the Bankruptcy Code on a  
2 flexible “case-by-case” basis. *In re Swedeland Dev. Grp., Inc.*, 16 F.3d 552 at 564; *see also In re*  
3 *O’Connor*, 808 F.2d 1393, 1396-97 (10th Cir. 1987) (stating that “courts have considered  
4 ‘adequate protection’ a concept which is to be decided flexibly on the proverbial ‘case-by-case’  
5 basis”); *In re Martin*, 761 F.2d 472, 476 (8th Cir. 1985) (“[T]o encourage reorganization, the  
6 courts must be flexible in applying the adequate protection standard.”).

7                   Adequate protection is necessary “to ensure that the creditor receives the value for  
8 which he bargained prebankruptcy.” *In re Swedeland Dev. Grp., Inc.*, 16 F.3d at 564; *see also In*  
9 *re Hubbard Power & Light*, 202 B.R. 680, 685 (Bankr. E.D.N.Y. 1996) (“The goal of adequate  
10 protection is to safeguard the secured creditor from diminution in the value of its interests.”)  
11 (quoting *In re 495 Cent. Park Ave. Corp.*, 136 B.R. 626, 631 (Bankr. S.D.N.Y. 1992)); *In re*  
12 *Sharon Steel Corp.*, 159 B.R. 165, 169 (Bankr. W.D. Pa. 1993) (“The purpose of providing  
13 ‘adequate protection’ is to [e]nsure that a secured creditor receives in value essentially what he  
14 bargained for.”). The Debtor bears the burden of proof on the issue of whether a secured creditor  
15 is adequately protected. *See* 11 U.S.C. § 363(p)(1); *In re Ctr. Wholesale, Inc.*, 788 F.2d 541, 544  
16 (9th Cir. 1986) (“[T]he trustee (debtor in possession) has the burden of proof on the issue of  
17 adequate protection.”).

18                   As noted above, pursuant to the Supplemental Cash Collateral Order, the Debtor’s  
19 consensual use of cash collateral expires by its terms on September 23, 2011. While the Debtor,  
20 Citibank and the Creditors’ Committee have engaged in extensive and good faith negotiations  
21 regarding the Debtor’s continued use of Citibank’s cash collateral pursuant to a long-term wind-  
22 down budget, the parties were unfortunately unable to reach an agreement. As a result, upon  
23 expiration of the Supplemental Cash Collateral Order, Citibank will no longer consent to the  
24 Debtor’s use of its cash collateral, and therefore the Debtor will not be permitted to use  
25 Citibank’s cash collateral, and therefore will not be able to administer its estate, unless it can  
26 provide adequate protection.

1                   As explained in the accompanying Verdisco Declaration, Citibank's interest in the  
2 collateral is not adequately protected. *First*, the Debtor estimates that the aggregate amount of  
3 its uncollected accounts receivable from the Hourly Cases, together with its cash and cash  
4 equivalents (excluding certain restricted cash, as well as foreign cash and receivables that it may  
5 not be able to repatriate back to the U.S.), aggregate approximately \$37.9 million, which is less  
6 than the remaining principal amount of Citibank's secured debt even before discounting such  
7 accounts receivable for the Debtor's likelihood of collection. In fact, the Debtor is unlikely to  
8 collect a substantial portion of its remaining accounts receivable, especially in light of the  
9 overwhelming percentage of such receivables that are more than 91 days old. Indeed, since the  
10 Petition Date, the Debtor has only actually collected approximately 50% of its projected  
11 collections over such period.

12                  *Second*, Citibank believes any recovery on the Debtor's other assets, including the  
13 Contingent Cases, is too speculative to ascribe any significant value to for purposes of assessing  
14 adequate protection of Citibank's interest at this juncture. By way of background, the  
15 Contingent Cases are pending lawsuits that the Debtor, prior to its dissolution, prosecuted on a  
16 contingent fee basis, and which have now largely been transferred to the new law firms of  
17 Howrey's former partners. Recent events with respect to one of the Contingent Cases – *In re*  
18 *Southeastern Milk Antitrust Litigation* – Master File No. 2:08-MD-1000 (E.D. Tenn.) (“SE  
19 Milk”) – demonstrate the unpredictable nature of such cases, and accordingly the uncertainty  
20 regarding the amount and timing of the Debtor's ultimate recovery with respect thereto. On  
21 July 12, 2011, approximately one month before the first scheduled trial date, the class plaintiffs  
22 in SE Milk filed a motion for preliminary approval of a proposed settlement with Dean Foods,  
23 Inc. (“Dean Foods”), one of the principal defendants in SE Milk (the “Dean Settlement”).  
24 Pursuant to the Dean Settlement, Dean Foods agreed to pay the class plaintiffs (i) \$60 million  
25 upon court-approval of the Dean Settlement and (ii) \$20 million per year for the following four  
26 years thereafter, for total settlement value of approximately \$140 million.

1                 Unfortunately, the District Court in SE Milk thereafter issued an order  
2 decertifying a portion of the plaintiff class, leading Dean Foods to move to vacate the Dean  
3 Settlement on August 5, 2011. The District Court entered an order vacating the Dean Settlement  
4 on August 19, 2011. As a result of these and other case developments, the District Court has  
5 delayed commencement of the SE Milk trial indefinitely. These recent events demonstrate the  
6 speculative and uncertain nature of Howrey's possible future recovery from such Contingent  
7 Cases, and why it is impossible to ascribe any value to such cases at this juncture.

8                 Based on the foregoing, the Debtor cannot carry its burden to prove that Citibank  
9 is adequately protected, and therefore the Debtor should not be permitted to use Citibank's cash  
10 collateral after the Supplemental Cash Collateral Order expires by its own terms on  
11 September 23, 2011. Accordingly, conversion of the Chapter 11 Case to a case under chapter 7  
12 of the Bankruptcy Code is in the best interest of the Debtor's estate because, in the absence of  
13 such relief, the Debtor will be unable to administer its estate. If the Court approves the Motion  
14 and authorizes the appointment of a chapter 7 (or chapter 11) trustee, Citibank intends to  
15 immediately negotiate with such trustee in good faith to reach a consensual agreement and  
16 budget regarding the trustee's use of Citibank's cash collateral.

17                 **NOTICE**

18                 No trustee or examiner has been appointed in the Chapter 11 Case. Notice of the  
19 Motion has been provided to the following parties, or, in lieu thereof, their counsel: (a) the  
20 Debtor; (b) counsel for the Creditors' Committee; (c) the Office of the United States Trustee for  
21 the Northern District of California; and (d) all parties that have filed a notice of appearance in  
22 this Chapter 11 Case. Citibank submits that, in light of the nature of the relief requested, no  
23 other or further notice need be given.

24  
25                 *[Remainder of page intentionally left blank]*  
26  
27  
28

## **CONCLUSION**

WHEREFORE, Citibank respectfully request that this Court enter an Order granting the relief requested herein, and granting to Citibank such other and further relief as it deems just and proper.

Respectfully submitted,

Dated: September 15, 2011

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